

² The Board notes that, following the July 22, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

to receive wage-loss compensation benefits following her return to full-time limited-duty work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 29, 2019 appellant, then a 53-year-old podiatrist, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and back strains, tendinitis in the third, fourth, and fifth fingers of the right hand, and triggering of the fourth finger of the right hand due to factors of her federal employment, including keyboarding, positioning while treating patients, nail clipping, and tasks requiring squeezing motions of the hand. OWCP accepted the claim for cervical and thoracic sprains and brachial plexus disorders. It paid appellant wage-loss compensation on the supplemental rolls for the period June 24 through August 17, 2019 and on the periodic rolls effective August 18, 2019.

On August 30, 2019 appellant completed an electronic funds transfer (EFT) form authorizing OWCP to deposit her compensation payments into a designated bank account. OWCP continued to pay appellant wage-loss compensation on the periodic rolls.

On January 23, 2020 appellant underwent an OWCP-authorized C5-7 anterior cervical discectomy and fusion.

On August 31, 2020 OWCP obtained a second opinion report on the nature and extent of the accepted conditions and appellant's work capacity from Dr. Frank A Luckay, a Board-certified orthopedic surgeon. Dr. Luckay opined that the finger was still triggering; however, the cervical and thoracic strains had resolved. He added that she is still symptomatic due to degenerative changes. Dr. Luckay advised that appellant could resume unrestricted work so long as she was ergonomically comfortable. In a work capacity evaluation form report (Form OWCP-5c), he returned appellant to full duty with no work-related restrictions "except for trigger finger or from non-work-related neck surgery."

Appellant returned to full-duty work on November 16, 2020.

On November 17, 2020 OWCP expanded its acceptance of the claim to include sprain of ligaments of lumbar spine, palmar fascial fibromatosis (Dupuytren's contracture), other specified diseases of the spinal cord, cervical spinal stenosis, cervical disc displacement, cervical radiculopathy, and cervical myelopathy.

In a December 7, 2020 letter, appellant acknowledged that she had returned to work on November 16, 2020 and that she was no longer entitled to wage-loss compensation. She explained, however, that she was physically unable to perform her assigned duties. Appellant asserted that Dr. Luckay had not understood that OWCP had authorized a cervical fusion.

In a December 10, 2020 memorandum of telephone call (Form CA-110), OWCP noted that the employing establishment verified that appellant had returned to work on November 16, 2020 with no restrictions.

A December 10, 2020 compensation termination form noted that appellant had returned to work with no wage loss on November 16, 2020, but had been paid compensation for total disability through December 5, 2020. OWCP calculated that for the period November 16, through December 5, 2020, appellant had been paid \$5,331.27 in compensation by payment dated December 5, 2020.

On May 19, 2021 OWCP advised appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$5,331.27 for the period November 16 through December 5, 2020 because she returned to work on November 16, 2020, but continued to receive wage-loss compensation benefits for disability. It further notified her of its preliminary determination that she was at fault in the creation of the overpayment because she had accepted a payment that she knew or reasonably should have known was incorrect. OWCP informed appellant that she had the right to submit evidence or argument if she disagreed with its finding. It also provided an overpayment action request form and informed her that she had a right to a precoupment hearing before an OWCP hearing representative. OWCP requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On June 19, 2021 OWCP received appellant's completed Form OWCP-20, signed on June 16, 2021. Appellant provided information about her income, assets, and expenses; however, she contested the finding of fault. Appellant asserted that she had contacted OWCP immediately upon receiving the EFT payment, and that she had no way to prevent its deposit.

By decision dated July 22, 2021, OWCP finalized, as modified, the preliminary overpayment determination that appellant had received an overpayment of compensation, finding that appellant had received an overpayment of compensation in the amount of \$5,331.27 for the period November 6 through December 5, 2020. It denied waiver of recovery of the overpayment as it found that she was with fault in the creation of the overpayment. OWCP further found that appellant had not responded to the preliminary notice of overpayment or otherwise contested the finding of fault.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴ A claimant is not entitled to receive

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8129(a).

disability benefits and actual earnings for the same time period.⁵ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that fact of overpayment has been established.

OWCP continued to pay appellant wage-loss compensation benefits for total disability through December 5, 2020, after she had returned to work on November 16, 2020. As noted above, a claimant is not entitled to receive compensation for disability during a period in which she had actual earnings.⁷ Therefore, an overpayment of compensation was created in this case.

The Board further finds, however, that the case is not in posture regarding the period and the amount of the overpayment. In its July 22, 2021 decision, OWCP found that appellant was overpaid \$5,331.27 for the period November 6 through December 5, 2020. However, as OWCP noted in its December 10, 2020 compensation termination worksheet, the period of overpayment began on November 16, 2020, the date appellant returned to work. There is no indication of record that the compensation appellant received for the period November 6 through 15, 2020 was improper, as she remained totally disabled and had not yet returned to work. OWCP's finding that appellant had been overpaid for the period November 6 through 15, 2020 is, therefore, in error.

Consequently, the Board finds that the case must be remanded to OWCP for determination of the correct period and amount of the overpayment. After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation was created. The Board further finds, however, that the case is not in posture for decision regarding the period and the amount of the overpayment.⁸

⁵ See *M.C.*, Docket No. 19-1263 (issued March 5, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁶ *D.D.*, Docket No. 20-1172 (issued September 30, 2021); *L.C.*, Docket No. 20-1058 (issued June 21, 2021); *A.H.*, Docket No. 20-0442 (issued January 26, 2021); *L.H.*, Docket No. 20-0115 (issued September 4, 2020); *C.A.*, Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.1 (September 2020).

⁷ *Id.*

⁸ In light of the Board's disposition in Issue 1, Issue 2, regarding fault, is moot.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 4, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board